



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Department of Medical Assistance Services
VAC Chapter Number:	Chapter 120
Regulation Title:	Home and Community Based Care for Individuals with Mental Retardation
Action Title:	MR Waiver
Date:	February 11, 2002; GOV APPROVAL NEEDED BY 4/15

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The proposed permanent regulations allow full implementation of the new Mental Retardation (MR) Waiver, as approved by the Centers for Medicare and Medicaid (CMS) (formerly HCFA) and address the following: 1) continued coverage of consumer-directed personal attendant, companion, and respite services; 2) continued coverage of personal emergency response systems; 3) continue the prevocational service that had been deleted in 1994; 4) maintain the work allowance for individuals on this waiver pursuant to the 2000 Appropriation Act; and 5) continue to address CMS' concerns about the health and welfare of MR Waiver recipients.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The Code of Virginia (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code of Virginia (1950) as amended, § 32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The Code also provides, in the Administrative Process Act (APA) §§ 2.2-4007 and 2.2-4012, for this agency's promulgation of proposed regulations subject to the Governor's review.

Subsequent to an emergency adoption action, the agency is initiating the public notice and comment process as contained in Article 2 of the APA. The emergency regulation became effective on October 17, 2001. The Code, at § 2.2-4007 requires the agency to file the Notice of Intended Regulatory Action within 60 days of the effective date of the emergency regulation if it intends to promulgate a permanent replacement regulation. The Notice of Intended Regulatory Action for this regulation was filed with the Virginia Register on October 17, 2001.

Title 42 of the *Code of Federal Regulations* § 430.25 permits states to operate, consistent with federal approval, programs that waive certain basic overarching Medicaid requirements. The broad overarching requirements that can be waived are state-wideness (the coverage of a service across the entire state), comparability of amount, duration, and scope of services (coverage of the same service for all persons within an eligibility category), and freedom of choice of providers.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The Department of Medical Assistance Services' (DMAS) original home and community based care waiver for individuals with Mental Retardation first became effective in 1990. Since that time, HCFA (now CMS), has granted successive renewal approvals. In 1999, HCFA conducted an audit review of Virginia's waiver and cited issues that the Commonwealth was required to address before further waiver approval would be granted. Loss of federal approval, and the concomitant loss of federal funding dollars would mean the re-institutionalization of the individuals who have been served in the community through these waiver services; in addition it would mean institutionalization of individuals who had previously avoided institutionalization due to the availability of the waiver services. For those individuals who could be expected to refuse to enter an institution, it would mean serious threats to their health, safety, and welfare as well as significant disruptions to their families and support systems.

The purpose of this proposal is to promulgate permanent regulations, to supersede the existing emergency regulations. This regulatory action is expected to help protect the health, safety, and welfare of participants in the new waiver. These regulations will help improve the health and welfare of families with children and adults who are affected by mental retardation. These regulations will provide community support services to enable these children and adults to live successfully in their homes and communities.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The Governor announced in October, 2000, that the Commonwealth would develop a new Mental Retardation (MR) Waiver to replace the existent waiver. The Secretary of Health and Human Resources appointed an MR Waiver Task Force to advise the Department of Medical Assistance Services (DMAS) on the development of this new waiver. The MR Waiver Task Force is comprised of family members and consumers, as well as, staff of DMAS, the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), and other state agencies and advocacy groups. The work of this Task Force resulted in a new waiver application being sent to CMS in April of 2001. Revisions to the application were made in September 2001 per CMS and DMAS was notified of CMS approval of the revised application also in September of 2001. The approval is contingent upon the Commonwealth implementing the waiver as proposed and also the following assurances that the Commonwealth made to CMS:

- 1) All facilities providing MR Waiver services licensed by the Department of Social Services (DSS) will apply for licensing by DMHMRSAS;

- 2) DMHMRSAS' Offices of Mental Retardation and Licensing will jointly conduct training for all assisted living facilities serving as MR Waiver providers;
- 3) Consumers whose conditions or services in these assisted living facilities raise health and safety issues will be immediately transferred to a more suitable setting; and
- 4) Case managers are required to conduct monthly on-site visits for all consumers residing in DSS licensed facilities.

In order to comply with the new waiver and to adhere to the assurances made to CMS, new permanent regulations are required. Without these regulations, DMAS lacks the regulatory authority to require these actions of the entities. The new licensing action must be completed within one year from its initiation in order for providers to continue to receive Medicaid reimbursement for these waiver individuals. Assisted living facilities failing to secure the new license within the designated time period will lose their MR waiver provider agreement with DMAS and the affected waiver participants will be moved to other suitable settings. In addition, the proposed regulations address the following changes from the old waiver:

- 1) Implement consumer directed personal assistance, companion and respite services in the MR Waiver in addition to agency directed services;
- 2) Increase the work allowance for waiver recipients, as mandated by the 2000 General Assembly Acts of Assembly Item 319#24c. This permits waiver recipients who are capable of paid employment to retain more of their earnings, rather than having to contribute more to their costs of care, to defray some of the costs of such employment (appropriate clothing, transportation meal expenses, etc). Employment enhances one's self esteem and generally contributes to one's sense of overall well being;
- 3) Include coverage of personal emergency response systems; and
- 4) Enhance utilization review procedures.

Consumer direction of personal assistant, companion and respite services and the personal emergency response systems are the least intrusive methods of providing these services under the MR Waiver. Because of the federal (CMS) health and safety concerns, DMAS is not permitted to continue to offer services and to conduct utilization reviews in the previous manner. DMAS must change the way services are provided and monitored or face not having the federal authority and dollars to provide the waiver services.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of

interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantage for the Commonwealth's citizens will be that individuals with mental retardation will be able to live as independently as possible in their communities. It will allow some of these individuals to live on their own and enable others to remain with their families. To the extent of their abilities, they will be able to function in their communities, attending school, obtaining employment and participating in the management of their own care.

To date, the Commonwealth has been very successful in serving people in the community as opposed to institutions at less than half the institutional cost per person. Currently, far more people are receiving services from the waiver than are in institutions. Indeed, the community programs have been so successful that the Commonwealth does not even have the institutional bed space required if all waiver program recipients were to be institutionalized. With over 5000 recipients depending on the MR waiver alone for needed services, not providing services would result in far greater health and welfare concerns as well as huge increases in the number of individuals in the Commonwealth's institutions. Such cost increases for the Commonwealth would be astronomical.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

The total MR Waiver expenditures for fiscal year 2001 were \$172,437,694 (total General Funds and Federal Financial Participation) for 5,056 recipients. These are on-going expenditures and not one-time. The projected costs to the localities should be minimal as these services are currently in place. The projected cost should remain fairly stable as the services are already being provided.

The individuals likely to be affected by the proposed regulation include the following:

1. Individuals with mental retardation and their families will have enhanced service options and will experience a greater sense of security in that enhanced monitoring of services will occur. Individuals with mental retardation will continue to avoid institutionalization as in the past under the previous MR waiver.

2. Personal assistants and companions hired by individuals in the MR waiver may have gainful employment that may not have otherwise been an option for them.

Businesses likely to be affected by the proposed regulations include assisted living facilities providing MR waiver services because they must now be licensed by DMHMRSAS

Other entities likely to be affected by the proposed regulations include case managers who will be required to conduct monthly on-site visits to individuals who are living in assisted living facilities that are providing waiver services. DMAS' utilization review practices will be enhanced as a result of these proposed regulations.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

The proposed regulations will repeal the following sections of the Virginia Administrative Code: 12VAC 30-120-210, 12VAC 30-120-220, 12VAC 30-120-230, 12VAC 30-120-240, and 12VAC 30-120-250.

The new MR waiver regulations will be located in the following sections of the Virginia Administrative Code: 12VAC30-120-211 through 12VAC30-120-259 excluding the old repealed sections noted above.

The proposed changes allow DMAS to fully implement the new MR Waiver as approved by the Centers for Medicare and Medicaid (CMS) and to uphold the assurances made by the Commonwealth to CMS.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

These proposed regulations are required in order for the agency to have the authority it requires to carry out the policies approved in the waiver proposal by the Centers for Medicare and

Medicaid Services. The various policy options contained in the waiver proposal, and paralleled in these regulations, were arrived at in discussions and conclusions of the MR waiver task force. Where these regulations vary from those discussions and expectations, those differences have been necessitated by conformance to federal laws and requirements.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

The Task Force for the Mental Retardation Waiver has been reviewing and advising DMAS in formal Task Force and core group meetings as well as individually by telephone and e-mail. In addition, the Department of Mental Health, Mental Retardation, and Substance Abuse Services has been represented on the Task Force and has also communicated with DMAS by telephone and e-mail.

Additional recommendations may be incorporated into the proposed regulations during the final comment period.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

DMAS has examined these regulations and, in so far as is possible, has ensured that they are clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

Due to the phase-in nature of the changes proposed in these regulations and the periodic waiver review necessitated by federal requirements, DMAS, the CMS, and the affected industry will be conducting regular reviews of the impact of these regulations.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

DMAS anticipates that the proposed regulations will have positive impact on the institution of the family and family stability. The proposed regulations are required in order to allow the Department of Medical Assistance Services to fully implement the new MR Waiver as approved by the Centers for Medicare and Medicaid (CMS) and to uphold the assurances made by the Commonwealth to CMS. Without the proposed regulations DMAS will risk continued federal approval of the waiver, and could experience subsequent loss of the related federal funding; this would result in the termination of services for the individuals who have become dependent on them in order to avoid institutionalization. The proposed regulations may assist families and individuals with strengthening the authority and rights of parents in the education, nurturing and supervision of their children. By ensuring the consumer-directed component of the waiver services individuals and their families may tailor services to meet their unique and specific needs in the areas of scheduling (i.e., weekends and evenings), cultural diversity, and personal preferences. The option of participating in consumer directed services is expected to encourage individuals and families to increase their self-sufficiency and the assumption of self-responsibility, their families and self-care. Exercising this option may lead to increased self-pride.

Increasing the work allowance for waiver individuals permits those who are capable of paid employment to retain more of their earnings rather than having to contribute more to their costs of care. They will be able to defray some of the costs of such employment (appropriate clothing, transportation, meal expenses, etc) and be more likely to contribute to household expenses. Employment, contributing to household expenses and increasing one's responsibility for care management can all lead to enhanced self-sufficiency, self-pride, and additional assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents.